UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	ON APPEAL
	:	NO. 2653
LICENSE NO. 962807	:	
Issued to: FABIAN ZERINGUE, SR.	:	

The complaint below alleges that a post-casualty urine sample collected from Mr. Fabian Zeringue, Sr., (Respondent) tested positive for cocaine. The complaint seeks revocation of Respondent's Coast Guard license, alleging that Respondent performed a safety sensitive function in violation of federal regulations governing the use of alcohol and dangerous drugs. The Honorable Archie Boggs, a United States Coast Guard Administrative Law Judge (ALJ), dismissed the complaint for failure of proof by a Decision and Order (D&O) issued on March 27, 2003. The Coast Guard appeals, seeking Commandant review pursuant to 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

FACTS

At all times relevant herein, Respondent was the holder of the above-captioned merchant mariner license, issued to him by the United States Coast Guard. Respondent's license authorizes him to serve as master of steam or motor vessels of not more than 100 gross registered tons upon near coastal waters, to serve as mate of steam or motor vessels

of not more than 200 gross tons upon near coastal waters, to engage in commercial assistance towing, and to serve as a radar observer unlimited.

On June 29, 2002, the 48-foot towing vessel UTV MISS LORI was eastbound on the Intracoastal Waterway (ICW) near mile marker 10 in Louisiana. The UTV MISS LORI was in the center of the channel, pushing an empty 200 foot hopper barge. At approximately 10 p.m. that evening, the shrimp boat F/V HECKLE AND JECKLE was westbound in the center of the ICW channel heading toward the UTV MISS LORI. As the vessels approached, the F/V HECKLE AND JECKLE turned to the UTV MISS LORI's starboard. The UTV MISS LORI responded by turning to port. When the vessels neared to within approximately 300 feet, the F/V HECKLE AND JECKLE veered to the UTV MISS LORI's port, crossing in front of and colliding with the UTV MISS LORI. The F/V HECKLE AND JECKLE sank; its four-person crew was subsequently rescued by a nearby fishing vessel. Respondent, who was employed by Trace Marine, LLC, and holds a U.S. Coast Guard license, was operating the UTV MISS LORI at the time of the collision.

Approximately three hours after the collision, Trace Marine ordered Respondent to submit to a drug test as soon as possible in accordance with federal regulations at 46 C.F.R. Parts 4.06 and 16.240.[1] Shortly before noon on the day after the accident, Respondent reported to a local hospital to provide a urine sample. Respondent met the urine sample collector, who asked Respondent for photo identification (ID). Respondent stated that he had left his wallet in his car, and offered to get it. The collector declined,

[1] 46 C.F.R. § 4.06-5(a) provides that "[a]ny individual engaged or employed on board a vessel who is determined to be directly involved in a serious marine incident shall provide blood, breath or urine specimens for chemical tests required by Sec. 4.06-10 when directed to do so by the marine employer or a law enforcement officer." *See id.* § 16.240 (same).

and proceeded to collect a urine sample from Respondent. A urine sample identified as Respondent's subsequently tested positive for cocaine.

PROCEDURAL HISTORY

A hearing on the complaint was held at the Coast Guard Marine Safety Office in New Orleans, Louisiana. The hearing began on August 27, 2002, then was continued until and completed on September 24, 2002. The Coast Guard presented testimony and documentary evidence on the collection and testing of Respondent's urine sample. Coast Guard witnesses included the Trace Marine port captain who ordered Respondent's drug test, the urine sample collector, the drug testing laboratory director, the certified scientist who reviewed the results of the drug test, and the physician who reviewed the results of the drug test. Respondent testified on his own behalf. Respondent also called the director of toxicology from a separate drug testing laboratory (not involved in the drug test) to describe standard urine collection protocols.

Respondent did not dispute that he provided a urine sample nor that a urine sample identified as his tested positive for cocaine. Nor did Respondent dispute that he signed a custody and control form certifying that: (1) he provided a urine sample to the collector, (2) the specimen bottles were sealed with tamper-evident seals in his presence, and (3) the information on the form and the bottle labels was correct. But Respondent did dispute that it was *his* urine sample that tested positive. Respondent focused his defense on the collector's failure to require photo identification.

The collector, who testified by telephone, described the standard procedures she follows when collecting urine samples, including: preparation of the bathroom area; requesting a photo ID from the donor; standing outside the bathroom door during the collection; asking the urine donor to watch the urine sample at all times until it is

packaged and sealed; transferring the urine sample from the collection bottle into two vials in front of the donor; asking the donor to help place a tamper evident seal over the vials and initial the seal; completion of a Drug Testing Custody and Control Form (DTCCF); and asking the donor to sign the DTCCF certifying that: (1) the donor provided a urine sample to the collector, (2) the specimen bottles were sealed with tamper-evident seals in the donor's presence, and (3) the information on the form and the bottle labels was correct.

On cross-examination, the collector testified that she remembered Respondent's urine collection because performing a post accident collection was, in her experience, unusual. She testified that she "vaguely" remembered Respondent, describing him as approximately 5'9" to 5'11" with medium to dark brown hair – she didn't believe his hair was long but couldn't say whether it was short or medium. She did not recall Respondent being either slim or heavy. The collector acknowledged that her failure to require Respondent to provide photo identification was a failure to follow standard procedures.

The DTCCF signed by Respondent was admitted into evidence. [Investigating Officer (IO) Exhibit 3] The form lists an ID number for the sample collected from Respondent. [IO Exhibit 3] The form includes a block signed by the collector certifying that the urine specimen was collected, labeled, sealed and released to a delivery service in accordance with applicable Federal requirements. [IO Exhibit 3] The form lists 12:36 p.m. as the "time of collection." [IO Exhibit 3] The laboratory copy of the form includes a block with the name and signature of the laboratory accessioner attesting that the laboratory received the primary specimen bottle with the "seal intact." [IO Exhibit 3] The Coast Guard offered an expert witness on handwriting analysis to testify that the

donor signature on the custody and control form was Respondent's, but Respondent admitted through counsel that the signature was his and the handwriting witness was not called.

The laboratory director testified as to the standard procedures followed by the laboratory when testing urine specimens. The director testified that the accessioner's signature indicates that the accessioner verified "the identification on the bottle matched that of the custody and control form," opened the bottle, and "received, reviewed, accessioned and then placed [the bottle] in temporary storage." [Tr. at 77 - 78] The initial screening test and confirmation test performed on the urine specimen were, according to the director, performed by two technologists at the laboratory. The laboratory director testified that the accessioner and technologists must follow standard procedures, and that there is no indication that standard procedures were not followed. The accessioner and technologists were not called as witnesses.

Respondent's toxicology witness, Ms. Patricia Pizzo – a frequent witness for the Coast Guard with 23 years experience in forensic toxicology, testified that a collector must receive a photo ID or notate the absence of identification on the custody and control form, neither of which occurred. The witness further testified that the weakest link in the urine testing program is ensuring that the collection of the sample has been properly controlled, and that the photo ID requirement helps ensure an exact link between the donor and the urine sample. On cross-examination, the witness acknowledged that failure to collect a photo ID is not a "fatal flaw" from a laboratory testing standpoint, but explained that the photo ID requirement is a collection issue while the term "fatal flaw" refers to laboratory testing issues. She explained that, for laboratories, fatal flaws

include: broken seals, lack of identification of the collector, insufficient volume to test, or mismatched specimen and chain of custody identification numbers. [Tr. at 66 - 67]

Respondent argued that the collector's failure to require photo ID demonstrates that required procedures were not followed, and that the failure to follow established procedures draws into question the integrity and reliability of the overall urine collection process followed in his case. Respondent asserted that other discrepancies drew into question whether his urine sample could have been confused with another urine sample. Respondent testified that he recalled providing a urine sample to the collector at approximately 12:00 noon, while the DTCCF lists 12:36 p.m. as the time of collection. Respondent also testified that, contrary to the collector's description, his head was shaved at the time of the collection, he is 5'9", and he weighs 260 lbs. Respondent acknowledged that he had previously tested positive for drug use, completed a drug rehabilitation program supervised by the Coast Guard, and that his Coast Guard license was subsequently returned to him. Respondent testified that he had not used cocaine in the weeks or months prior to the collision, and that it had been approximately six years since he last used cocaine.

The Coast Guard argued that the chain of custody for Respondent's urine sample was maintained at all times and that the urine sample tested positive for cocaine. The Coast Guard further argued that failure to collect a photo ID was not a fatal flaw and any inference that someone else may have provided the sample is neither credible nor supported by the evidence. The collector's description of Respondent was, according to the Coast Guard, insignificant given her statement that her recollection was vague. Finally, the Coast Guard argued that there is no meaningful significance to Respondent's

recollection of providing the sample at noon and the DTCCF listing 12:36 as the "time of collection" because the collector may have written 12:36 to indicate the time the sample was released to the courier rather than the time the sample was collected from Respondent. [Tr. at 88]

The ALJ issued his decision on March 27, 2003. The ALJ found that the collector did not obtain positive identification of Respondent as required by 49 C.F.R. Part 40. Explaining that the "failure to obtain proper identification on Mr. Zeringue is fatal," the ALJ rejected the Coast Guard's proposed findings of fact with respect to the laboratory testing of the urine sample. [D&O at 4] The ALJ accepted Respondent's proposed findings that the

> entire and only purpose of the rigorous specimen collection requirements is to ensure proper and accurate identification of specimens to be tested, and the reason for such rigorous regulation is that no respondent is ever in a position to know anything about the specimen testing procedures and conclusions because he has no way of knowing whether they were followed. … The gravity of this proceeding is not to be under estimated [sic], because the Coast Guard has indicated its intention to deprive Mr. Zeringue of his livelihood for life. Accordingly, the requirements of the collection and testing regulations and procedures must be strictly adhered to, and this forum cannot ignore the mandatory provisions of those requirements. … Considering all of the facts and evidence adduced by the parties … the Coast Guard has not borne its burden of proving that the specimen collected and the test results therefrom are attributable to Respondent, Mr. Zeringue.

[D&O at 7] The decision extensively quotes Ms. Pizzo's testimony as to the significance of the positive identification requirements set forth in 49 C.F.R. Part 40. Concluding that the collector "did not follow the guidelines for collection as provided for in the Code of Federal Regulations," the ALJ held the alleged use of cocaine "not proved due to the failure of the collector to comply with the regulations" and dismissed the complaint. [D&O at 8, 12]

The Coast Guard appeals arguing that there is "no basis in fact or law" for the ALJ's determination that failure to require photo ID "represented a fatal flaw requiring dismissal." [Brief of Appellant at 3] The Coast Guard argues that failure to collect a photo ID is a mere technical infraction of 46 C.F.R. § 40.61(c), not a "fatal flaw" as identified in 46 C.F.R. Subpart I. Appellant Coast Guard further argues that several Commandant Decisions on Appeal (CDOAs) have held that minor technical discrepancies in the drug testing process are not fatal flaws unless the urine specimen's integrity or the chain of custody are breached. Finally, Appellant objects to a finding in the D&O of no indication that Appellant was at fault in the collision, arguing that fault as to the collision is irrelevant and was neither alleged nor litigated.

BASES OF APPEAL

The Coast Guard specifies the following two bases of appeal:

I. *The ALJ's decision that the specimen collector's failure to obtain a photo identification of the Respondent is a fatal flaw to the Department of Transportation's (DOT's) drug testing procedures necessitating dismissal of the Coast Guard's complaint has no basis in fact or law.*

II. *The ALJ's acceptance of Respondent's Findings of Fact and Conclusions of Law number 2, is not supported by the record and is inherently incredible since the Respondent was never charged with negligence for the underlying collision that resulted in his drug test and the matter was never litigated at the hearing.*

OPINION

This appeal turns on the ALJ's finding that "failure to obtain proper identification on Mr. Zeringue is fatal" and the ALJ's holding that the alleged use of cocaine was not proved. [D&O at 4, 12]

The outcome of this appeal is guided by our governing standard of review and the deference due an ALJ in assessing the evidence. Appellant Coast Guard correctly notes

that, as a matter of law, the D&O should not have included a finding of fact or conclusion of law as to fault in the collision. The D&O will be modified accordingly. There is no showing, however, that the ALJ was arbitrary and capricious in finding the alleged use of cocaine not proved. Except as to the issue of fault, the D&O is affirmed.

A. Standard of Review

On appeal, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion. 46 C.F.R. § 5.701. Under the governing standard of review on appeal,

> great deference is given to the Administrative Law Judge in evaluating and weighing the evidence. The Administrative Law Judge's determinations in this regard will not be disturbed and will be upheld on appeal unless they are clearly erroneous, arbitrary and capricious, or based on inherently incredible evidence.

Appeal Decisions 2541 (RAYMOND) (citing Appeal Decisions 2522 (JENKINS), 2492 (RATH), 2333 (ALAYA)). *See also* Appeal Decisions 2647 (BROWN), 2628 (VILAS) ("If the ALJ's findings are supported by reliable, credible evidence, they will be upheld because he saw and heard the witnesses, even if there was evidence on which he [or I sitting in his stead] might reach a contrary conclusion. Stated another way, I will not substitute my findings of fact for the ALJ's unless the ALJ's are arbitrary and capricious."). Appeal Decision 2546 (SWEENEY).

B. The ALJ's Decision on Proof of Drug Use

A Coast Guard license "shall" be revoked if "it is shown that a holder has been a user of, or addicted to, a dangerous drug…unless the holder provides satisfactory proof that the holder is cured." 46 U.S.C. § 7704(c). At the hearing below, the Coast Guard

bore the burden of proving Respondent's alleged use of cocaine by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702. A *prima facie* case of drug use can be established where the Coast Guard proves that a person has failed a drug test required under the regulations. *See* 46 C.F.R. § 16.201(b). The ALJ found that the collector's failure to obtain identification of Respondent fatal to proving that the specimen tested was from Respondent, and held the alleged use of cocaine not proved. The Coast Guard argues on appeal that the ALJ had no basis in fact or law for concluding that failure to obtain a photo ID from Respondent is a "fatal flaw to the DOT drug testing procedures necessitating dismissal."

1. Fatal Flaw

The term "fatal flaw" has a specific meaning in the federal drug testing regulations. Coast Guard regulations applicable to "Merchant Marine Officers and Seamen" appear at 46 C.F.R. Subchapter B. Those regulations at Part 16 prescribe standards and procedures for testing merchant marine personnel for the use of dangerous drugs. 46 C.F.R. § 16.101(b). The regulations require marine employers to "ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol." *Id.* § 16.240. A person who fails a drug test required under Part 16 "will be presumed to be a user of dangerous drugs." *Id.* § 16.201(b). The regulations specify that drug testing conducted under Part 16 "must be conducted in accordance with 49 CFR Part 40" and that the "regulations in 49 C.F.R. Part 40 should be consulted to determine the specific procedures which must be established and utilized." *Id.* § 16.113.

49 C.F.R. Part 40 is titled "Procedures for Transportation Workplace Drug and Alcohol Testing Programs." Part 40 addresses both the process of collecting urine specimens and the testing of urine specimens by drug testing laboratories. In Subpart E, Urine Specimen Collections, the regulations specify the preliminary steps a urine sample collector "must take," including:

> (c) Require the employee to provide positive identification. You must see a photo ID issued by the employer (other than in the case of an owner-operator or other self-employed individual) or a Federal, state, or local government (e.g., a driver's license). You may not accept faxes or photocopies of identification. Positive identification by an employer representative (not a co-worker or another employee being tested) is also acceptable. If the employee cannot produce positive identification, you must contact a DER to verify the identity of the employee.

49 C.F.R. § 40.61(c).

In Subpart F, Drug Testing Laboratories, the regulations specify the steps that a drug testing laboratory must follow when receiving a urine specimen. As a first step, the laboratory must inspect each specimen for "fatal flaws." *Id.* § 40.83(c). The regulations list as fatal flaws the following:

> (1) The specimen ID numbers on the specimen bottle and the CCF do not match;
> (2) The specimen bottle seal is broken or shows evidence of tampering, unless a split specimen can be redesignated (see paragraph (g) of this section);
> (3) The collector's printed name and signature are omitted from the CCF; and
> (4) There is an insufficient amount of urine in the primary bottle for analysis, unless the specimens can be redesignated (see paragraph (g) of this section).

Id. § 40.83(c)(1) to (4); *see id.* § 40.199(b)(1) to (4). When a "fatal flaw" is found, the testing process must be stopped. *Id.* §§ 40.83(d), 40.199(a).

During the hearing, Respondent's toxicology witness, Ms. Patricia Pizzo, testified that failure to collect a photo ID is not a "fatal flaw" from a laboratory testing standpoint, explaining that the term "fatal flaw" refers to laboratory testing issues while the photo ID requirement is a collection issue. Ms. Pizzo testified that ensuring that the proper monitoring of the collection of a urine specimen is the weakest link in the urine testing program, and that the photo ID requirement helps ensure an exact link between the donor and the urine sample. The list of "fatal flaws" identified in 49 C.F.R. § 40.83(c) does not include potential problems in the collection process that might indisputably refute a positive test result, such as where a person's identification label is affixed to – and custody and control form is identified with – another person's urine specimen (as Respondent argued may have happened in his case). [Tr. at 86]

The ALJ rejected the Coast Guard's proposed findings of fact and conclusions of law as to events that transpired after the collector failed to obtain photo ID, because "failure to obtain proper identification on Mr. Zeringue is fatal." [D&O at 4] The ALJ concludes that failure to obtain ID was fatal to the government's proof that it was Respondent's urine that was tested. The ALJ's use of the term "fatal" is consistent with its common usage in judicial decisions addressing sufficiency of proof and is distinct from the "fatal flaw" concept that is not involved here. *See, e.g., U.S. v. Rico-Gonzalez*, 79 Fed. Appx. 988, 2003 WL 22506469 (9th Cir. 2003) ("an obvious error in the date of one of the documents is not fatal to the sufficiency of the government's proof of identity"); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 591 (6th Cir. 2003) ("the same failures of the plaintiff's material proof, coupled with the same overwhelming

uncontroverted evidence favorable to the defendant, are fatal to the plaintiff's circumstantial case.")

The ALJ ultimately held that "the Coast Guard has not borne its burden of proving that the specimen collected and the test results therefrom are attributable to Respondent, Mr. Zeringue," explaining that this conclusion is based on a consideration of "all of the facts and evidence adduced by the parties." [D&O at 7] The accepted findings of fact note not only that the collector failed to obtain positive ID, but also Respondent's testimony that he had not used cocaine in the weeks or months prior to the collision and that Respondent's appearance is different than the description provided by the collector at the hearing. [D&O at 6-7] The D&O refutes Appellant's assertion that "the sole basis" for the ALJ's holding was the failure to obtain positive identification.

2. Presumption of Drug Use

Next, Appellant argues that the Coast Guard established a *prima facie* case of drug use and thus was entitled to a presumption that Respondent used drugs. As noted above, a person who fails a drug test under 46 C.F.R. Part 16 "will be presumed to be a user of dangerous drugs." 46 C.F.R. § 16.201(b). The Coast Guard notes the three key elements that must be proved to establish a *prima facie* case (*i.e.*, presumption) of use of a dangerous drug: "(1) that the respondent was the person who was tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16" (citing Appeal Decision 2603 (HACKSTAFF)). If a Respondent produces no evidence in rebuttal to proof of the three elements, "the ALJ may find the charge proved on the basis of the presumption alone." Appeal Decision 2603 (HACKSTAFF); *see* 33 C.F.R. § 20.703 (a presumption in a Coast Guard

administrative hearing imposes on the party against whom it lies the burden of going forward with evidence to rebut or meet the presumption, but does "not shift the burden of proof in the sense of the risk of non-persuasion").

The first element that must be proved to establish a presumption of use of a dangerous drug requires "proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample number or Drug Testing Custody and Control number which is assigned to the urine sample and which identifies the sample throughout the chain of custody and testing process, and proof of the testing of that sample." Appeal Decision 2603 (HACKSTAFF). Here, the sufficiency of the Coast Guard's proof of identity – that it was Respondent's urine specimen that was tested – was challenged and evidence in rebuttal was provided. Respondent testified that he did not use cocaine in the weeks or months prior to the drug test, that the collector failed to follow required procedures by not collecting his ID, that he recalled providing his urine specimen to the collector 36 minutes earlier than the time listed on the DTCCF and that his physical appearance is different than the description provided by the collector. [Tr. at 42 - 46, 78 - 79]

The ALJ was presented with evidence challenging the Coast Guard's "proof of the identity of the person providing the specimen," thus challenging the Coast Guard's ability to establish the presumption. Appeal Decision 2603 (HACKSTAFF). Moreover, because Respondent did provide evidence in rebuttal to the Coast Guard's proof of identity, the Coast Guard was not entitled to rely on the presumption alone. Appeal Decision 2603 (HACKSTAFF). The ALJ, "[c]onsidering all the facts and evidence adduced by the parties," concluded in this case that "the Coast Guard has not borne its

burden of proving that the specimen collected and the test results therefrom are attributable to Respondent, Mr. Zeringue." [D&O 7-8]. Whether Respondent "was adequately identified as the donor of the urine sample which showed drug use is a question of fact for the Administrative Law Judge. … His conclusions will not be overturned unless they are without support in the record and inherently incredible." Appeal Decision 2542 (DEFORGE). The Appellant has not shown and the record does not demonstrate that the ALJ's findings are without support or are inherently incredible.

3. Precedent

Finally, Appellant argues that several CDOAs have held that "discrepancies in the drug testing process that are minor and technical in nature are not fatal flaws unless the infractions breach the chain of custody or the specimen's integrity." [Brief of Appellant at 6] Appellant cites four cases in which drug use allegations were found proved by the ALJ despite errors in the drug collection process, but each is distinguishable in key respects.

Appellant primarily relies on Appeal Decision 2542 (DEFORGE), which upheld an ALJ's finding of use of marijuana despite the fact that the collector did not obtain photo ID when the specimen was received. DEFORGE notes that adequate identification of the donor of a urine sample is a question of fact for the ALJ and that the ALJ found the evidence of identification, including the donor's signature on "the requisite portions of the documentation," sufficient in that case. *Id.* Appellant cites Appeal Decision 2631 (SENGAL), which remanded the ALJ's finding of use of marijuana based on "considerable confusion as to both how the specimen donor was identified at the time of the collection and the identity of the person who signed [a] memorandum rectifying the

incomplete [custody and control form]." The SENGAL decision notes that "minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity," but recognizes that, "[i]n the interest of justice and the integrity of the entire drug testing system, it is important that the procedures outlined in 49 C.F.R. Part 40 are followed to maintain the system." *Id.* Finally, Appellant cites Appeal Decisions 2522 (JENKINS) and 2537 (CHATHAM) , both of which upheld ALJ drug use findings despite missing entries on the custody and control form (CHATHAM) and failure to require the donor to wash his hands (JENKINS).

This case – like all cases – involves its own unique facts and circumstances. The testimony received and documents admitted into evidence in this case do not duplicate the evidence admitted in prior cases. Accordingly, the ALJ's findings of fact in this case are not prescribed by factual findings in prior unrelated cases. In each case cited by Appellant, the ALJ who is entrusted with listening to the testimony and weighing the evidence, found the alleged drug use proved. Here, the ALJ found the alleged drug use not proved. Whether an ALJ finds an allegation proved or not proved, great deference will be accorded the ALJ's evaluation and weighing of the evidence, Appeal Decision 2541 (RAYMOND), because it is the ALJ who "saw and heard the witnesses" and the evidence. Appeal Decision 2628 (VILAS). Findings of fact will not be substituted for those of the ALJ unless the ALJ's findings are arbitrary and capricious. Appeal Decision 2628 (VILAS). No basis has been presented and none is evident for concluding that the ALJ's findings in this case were arbitrary and capricious.

This CDOA does not hold that the failure to follow identification procedures is fatal to proving drug use in all cases. Nor does this decision speculate whether the Coast Guard could have demonstrated through other evidence that it was Respondent's urine that was tested. This decision is guided by the deferential standard of review applicable to ALJ determinations on weight of evidence and sufficiency of proof where the ALJ's decision rested on all the facts and circumstances including, but presumably not limited to, the failure to obtain photo ID.

II.

C. The ALJ's Finding on Collision Fault

Appellant's second and final argument is that the ALJ erred in accepting Respondent's proposed finding that Respondent was not at fault in the collision that led to the drug test. Appellant argues that whether Respondent is at fault for the collision is irrelevant to the allegation that Respondent used cocaine, and that the ALJ should not have made a finding on fault in the D&O.

At the hearing, the IO introduced into evidence IO Exhibit 1, a form titled "Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident" (also known as a CG-2692B), which includes details on the facts and circumstances of the collision. Nonetheless, when Respondent began his testimony by describing the circumstances of the collision, the Coast Guard objected on relevance grounds. The Coast Guard argued that the drug test was required as a routine matter because of the serious nature of the casualty, not because of fault. The ALJ sustained the Coast Guard's objection and no further testimony as to the collision was allowed.

Appellant objects to the finding in the D&O that Respondent was not at fault in the collision, but does not object to the subsequent finding that

> Mr. Zeringue was interviewed after the accident by Coast Guard personnel … who found no indication of lack of sobriety or drug influence of Mr. Zeringue. His employer, Trace Marine, requested Mr. Zeringue after the accident to operate the vessel UTV MISS LORI to the Michoud docking facility, a trip of approximately one hour duration. That trip and the docking operation proceeded without incident.

[D&O at 6] In fact, the Coast Guard proposed and the ALJ accepted the finding that

> On June 29, 2002, at approximately 2200, Mr. Zeringue was acting under the authority of his Coast Guard license while serving as the operator of UTV MISS LORI, when it was involved in a collision with a commercial shrimping vessel in the Intercoastal Waterway at mile marker 10, near the entrance to Bayou Bienvenue.

[D&O at 3] Thus, the Coast Guard focuses its objection on the finding that Respondent was not at fault in the collision, not on findings concerning the circumstances of the collision or whether Respondent appeared to be under the influence of drugs or alcohol at the time of the collision. Indeed, Respondent could have used drugs without being at fault in the collision or at fault in the collision without having used drugs. Either way, the Coast Guard is correct that it is Respondent's alleged use of drugs that is relevant, not fault in the collision.

Given that the ALJ sustained on relevance grounds the Coast Guard's objection to testimony concerning fault, the ALJ had no basis to find in the D&O that Respondent was not at fault in the collision. However, nothing in the decision or the record indicates nor does the Coast Guard argue that the finding on fault influenced the ALJ's conclusion that the alleged drug use was not proved. Thus, there is no evidence that the Coast Guard's case was prejudiced by the finding on fault. Accepting the proposed finding on fault in the collision was error, but that error was harmless.

CONCLUSION

The ALJ's holding that the alleged drug use was not proved is entitled to deference under the applicable standard of review, is not arbitrary, capricious, or clearly erroneous, and is legally sufficient. The ALJ's finding that Respondent was not at fault in the collision is harmless error.

ORDER

The ALJ's D&O dated March 27, 2003 is MODIFIED by striking that part of the D&O, on page 5, that accepts Respondent's (there Respondent's) proposed finding of fact and conclusion of law number 2 as to fault. In all other respects, the D&O is AFFIRMED.

TERRY M. CROSS
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 18 day of May, 2005